inadmissible under Section 24 of the Evidence Ordinance. I therefore ordered the learned Magistrate to take further evidence and thereafter to give judgment according to law.

Order accordingly.

SULTAN BIN RAHMANSA v. REGINA

[A. Cr. J. (Spenser Wilkinson J.) March 22, 1955]
[Penang — Criminal Appeal No. 1 of 1955]

Courts Ordinance, 1948, s. 85 — Transfer of a case from Magistrate's Court to Sessions Court — Whether Magistrate can transfer a case after he has found the accused guilty — Criminal Procedure Code (Cap. 21) s. 294.

In this case the appellant was charged with voluntarily causing hurt to one Puteh binti Abdul Kadir with a dangerous weapon contrary to s. 324 of the Penal Code. The learned Magistrate after hearing the evidence for the prosecution and the defence recorded that he was satisfied that the appellant had attacked the complainant and had struck her with the weapon. He then expressed the opinion that the Court had no sufficient power to deal with the case adequately and transferred the case for trial before the Sessions Court. Subsequently the case was retried before the Sessions Court and the appellant was convicted and sentenced to six months' imprisonment.

Held: (1) the power given to a Magistrate's Court by the proviso to s. 85 of the Courts Ordinance, 1948, must be exercised, if it is exercised at all, before the Magistrate has come to a conclusion upon the guilt or otherwise of the accused and therefore the learned Magistrate in this case was wrong in transferring the case to the Sessions Court; (2) the trial before the Sessions Court in this case was irregular, as the appellant had already been tried by the Magistrate.

Case referred to:—

(1) *Public Prosecutor v. Viran* (1947) M.L.J. 62 p. 65; (1946) M.U.L.R. 61 p. 67.

MAGISTRATE'S CRIMINAL APPEAL.

Jag-Jit Singh for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Spenser Wilkinson J.: — The appellant was tried before the Magistrate's Court upon a charge of voluntarily causing hurt to one Puteh binti Abdul Kadir with a dangerous weapon contrary to Section 324 of the Penal Code. After hearing the whole of the evidence for the prosecution and the defence the learned Magistrate recorded that he was satisfied that the accused had attacked the complainant and had struck her with a weapon which produced the wound described by the Medical Officer. He then expressed the opinion that the Court had no sufficient power to deal with the case adequately and transferred the case for trial by the Sessions Court.

The learned President of the Sessions Court retried the case and at the conclusion of the evidence before him he convicted the appellant and sentenced him to six months' imprisonment.

In my opinion the learned Magistrate had no power to transfer the case as he did to the Sessions Court and the Sessions Court had no power to retry the case. It is well established that a Magistrate's Court has no power to transfer a case to a higher Court for sentence and this is in substance what the learned Magistrate purported to do. Having heard the case to its conclusion it was in any opinion his duty himself to deal with the appellant according to law. The power given to a Magistrate's Court by the proviso to Section 85 of the Courts Ordinance, 1948, must be exercised, if it is exercised at all, before the Magistrate has come to a conclusion upon the guilt or otherwise of the accused. It must be remembered that in a summary trial the Court has to come to a conclusion at the close of the case for the prosecution as to whether or not the case has been made out which would warrant a conviction. In my opinion, therefore, it is improper for a Magistrate to exercise the power of transfer once he has called upon the accused for his defence. It has been held that a Magistrate must have before him some material upon which to come to a conclusion that the case is one proper to be transferred to a Sessions Court (see *Public Prosecutor v. Viran*[1]); but in the great majority of cases it should be apparent to a Magistrate whether or not the case is one which he could adequately deal with if a conviction resulted by the time he has heard the main story of the prosecution which will usually be contained in the complainant's evidence.

In the present case the learned Magistrate actually recorded a specific finding of guilt before making the transfer and in my opinion this was wrong.

As regards the so-called trial in the Sessions Court, the appellant had already been tried by the Magistrate and although the learned Magistrate had not actually recorded a conviction as such his recording of a finding of guilt in my opinion precluded the Sessions Court from trying him a second time. Whilst the circumstances did not come within the strict wording of Section 294 of the Criminal Procedure Code because the learned Magistrate had not actually recorded a conviction the omission of the learned Magistrate to do so was in itself an irregularity, because he had found the appellant guilty. The mere omission of the learned Magistrate to convict could not in my view give the Sessions Court jurisdiction to try the appellant over again.

The learned Deputy Public Prosecutor who appeared on the appeal conceded at the outset that the trial before the Sessions Court was irregular, and therefore for the reasons above given I declared that the trial before the Sessions Court was a nullity and held that the learned Magistrate having upon the facts

found the appellant guilty ought to have recorded a conviction.

Acting in revision, therefore, I cured the irregularity by recording an order of conviction.

Having heard the evidence of the Probation Officer I came to the conclusion that this was a case where it would be proper to make an order in the nature of a probation order, and I, therefore, bound over the appellant in the sum of $500 with his two brothers as sureties for a period of two years to be of good behaviour; and I made it a condition of the bond that he should reside in Butterworth and should not during the period of the bond enter Mukims XIII and XIV in the Ayer Itam area, Penang. In view of his residing in Butterworth I made no order in regard to the Probation Officer, but this Officer undertook to keep the accused under observation from time to time.

Order accordingly.

TAN TEOW SWEE v. REGINA

[A. Cr. J. (Spenser-Wilkinson J.) December 14, 1954]
[Penang — Criminal Appeal No. 53 of 1954]

Penal Code ss. 380, 454 and 457 — Possession of recent stolen property — Presumption under s. 114 Evidence Ordinance — Withdrawal of Counsel after prosecution case — Whether adjournment should be granted to enable accused to obtain another Counsel.

The appellant was charged with housebreaking by night by entering a building to commit theft under s. 457 of the Penal Code. At the end of the prosecution case the learned President amended the charge to one under s. 380 Penal Code i.e. theft in a dwelling. Counsel for the appellant withdrew from the case on refusal by the Court to adjourn the hearing for 12 days on the amended charge, though Court was willing to grant a short adjournment.

There were 2 grounds raised in the appeal. First, that there was no evidence that the appellant was sufficiently in possession of the stolen property (26 bags of tea dust) to raise the presumption under s. 114 Evidence Ordinance and second, that the Court should have given the appellant an opportunity of obtaining another Counsel.

Twelve of the bags had been stored with P.W. 6 and subsequently sold and delivered by the appellant to P.W. 7. 10 bags were found in an open space on being pointed out by the appellant to the investigating officer; 2 bags were found loaded on a tricycle which was being pedalled by some unknown person.

Held: (1) with regard to the 12 bags there was evidence that they were very recently stolen property and that the appellant was in possession of them. Regarding the 10 bags, the evidence given by the investigating officer should not have been admitted without evidence as to what the appellant had said which led to the officer to go with him to find the sacks; (2) on the second ground of appeal, in view of the strength of the evidence it is clear that the presence of Counsel for the defence at that stage would have made no difference and that therefore the accused was in no way prejudiced.

Cases referred to:—

(1) *Rex v. Laughlin* 35 Cr. App. R. 69.

(2) *Tai Chai Keh v. Public Prosecutor* (1949) M.L.J. 68.

(3) *Lim Ah Oh v. Rex* (1956) M.L.J. 269 p. 270; (1950) M.L.R. 236 p. 238.

MAGISTRATE'S CRIMINAL APPEAL.

I. K. Meek for the appellant.

D. C. Jackson (Sr. Federal Counsel) for the respondent.

Cur. Adv. Vult.

Spenser Wilkinson J.: — The appellant was charged before the Sessions Court with housebreaking by night by entering a building in order to the committing of the offence of theft of 26 sacks of tea dust valued at $6,500, contrary to Section 457 of the Penal Code.

At the close of the case for the prosecution Counsel for the appellant submitted that there was no evidence under Section 457 whereupon the learned President amended the charge to one of theft in a building of the same 26 sacks of tea dust, contrary to Section 380 of the Penal Code. It is not clear upon what ground it was submitted that there was no evidence under Section 457. Presumably the submission was made because there was no precise evidence of the time at which the breaking took place. Counsel appears to have been under the impression that Section 114 of the Evidence Ordinance did not apply to housebreaking. I think there is no doubt that it does. In *Rex v. Loughlin*[1], the Court of Criminal Appeal said:—

"It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking."

Illustration (a) to Section 114 of the Evidence Ordinance is but an illustration of the general proposition contained in the Section and I have no doubt the principle expressed in *Rex v. Loughlin*[1] applies as much in this country as it does in England. I think it was unfortunate that the learned President did not alter the charge to one under Section 454 (housebreaking in order to the committing of theft) rather than to one under Section 380.

The appellant was re-charged upon the amended charge and claimed trial whereupon Counsel for the defence was asked whether he would like a short adjournment in order to consider the amended charge. In reply to this Counsel asked for an adjournment to a date about twelve days ahead, which the learned President (in my view quite properly) refused, whereupon Counsel asked for leave to withdraw from the case. The learned President thereupon (also in my opinion very properly) informed Counsel that if he wished to leave the Court he might do so, but that he could not give him leave to withdraw. Counsel thereupon left the Court leaving his client to fend for himself as best he could.